

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF
SRI LANKA

In the matter of an Appeal against the
Judgement of the Commercial High
Court of Colombo dated 05.05.2017

Chithra Balasooriya,
No. 48/5, Cornell Avenue,
Nadimala, Dehiwala

PLAINTIFF

Vs.

Thissa Nagodavithana,
No. A1/8, Perahera Mawatha,
Colombo 03

DEFENDENT

SC/CHC/Appeal/45/2017

HC(Civil)/53/2006/03

Warnakulasooriya Walter Fernando
(Deceased)
'New Cinema', Colombo Road,
Wennapuwa

Added – 2nd DEFENDANT

And Now Between

Thissa Nagodavithana,
No. A1/8, Perahera Mawatha,
Colombo 03

1st DEFENDANT-APPELLANT

Charith Abishek Nagodavithana,
No. A1/8, Perahera Mawatha,
Colombo 03

SUBSTITUTED 1st DEFENDANT-
APPELLANT

Vs.

Chithra Balasooriya,
No. 48/5, Cornell Avenue,
Nadimala, Dehiwala

PLAINTIFF-RESPONDENT

Before: **Justice A.L. Shiran Gooneratne**
 Justice Dr. Sobhitha Rajakaruna
 Justice Sampath B. Abayakoon

Counsel: Charith Galhena with Ms. Piyahasie Dias instructed by Mrs.
 Mayomi Ranawaka for the Substituted 1st Defendant-Appellant.

 Dr. Lasantha Hettiarachchi with Ms. Nishadini Gunawardana
 instructed by Ms. Dayani Tennakoon for the Plaintiff-Respondent.

Argued on: 11/11/2025

Decided on: 20/02/2026

A.L. Shiran Gooneratne J.

1. Factual Background

1.1. Plaintiff's Position

By Plaint dated 23/10/2006, the Plaintiff–Respondent, the producer of the film Parasathumal, instituted action in the Commercial High Court of Colombo in Case No. HC (Civil) 53/2006/03, alleging infringement of his intellectual property rights in respect of the said audiovisual work.

In paragraphs 4 and 5 of the Plaint, the Plaintiff–Respondent stated that he is the producer and lawful owner of economic rights in the said film and that he incurred a cost of Rs. 200,000 for the production, promotion, and other related expenses of the movie in 1964/1965.

In paragraph 8, he stated that the film was remastered in 2004 using Kodak films, and that he incurred a cost of Rs. 2,000,000/= for that process.

In paragraphs 9 and 10, he stated that subsequent to the remastering, he had entered into a contract with Ceylon Theaters to broadcast the film in theatres and that, since then, he had entered into several written agreements with different parties to broadcast the film to the public.

He further alleged that, without his authority, the 1st Defendant–Appellant distributed copies of the film for television broadcast. Such unauthorized telecasting allegedly took place on “Derana” on or about 08/03/2006 and on “Sirasa” on or about 30/09/2006. He stated that he sent a letter of demand to Derana and that, in reply, Derana indicated that the version telecast was a copy of the film supplied by the Defendant.

He further stated that he subsequently learned that Sirasa was planning to telecast the film as part of a tribute program held in memory of the late Gamini Fonseka. After becoming aware of this intended telecast, he stated that he caused a letter to be sent to Sirasa by his Attorney, informing Sirasa that he was the lawful owner of the film, that he had not surrendered or assigned his rights to any person, and that if Sirasa so desired, it could obtain the film from the Plaintiff. Notwithstanding the said letter, Sirasa proceeded to broadcast the film on or about 30/09/2006. He further stated that he later learned that the Defendant had provided a copy to Sirasa.

In the plaint, the Plaintiff–Respondent sought interim relief and damages, alleging that the Defendant had violated his intellectual property rights, had been unjustly enriched, and that the Plaintiff had suffered loss as a result of the Defendant’s actions. He sought, *inter alia*, an order directing the Appellant to hand over possession of audio-visual discs and other material containing the audio-visual work *Parasathumal*, a permanent injunction restraining the use of copies of the work for public screening and/or any other commercial purpose, and an interim injunction pending the final determination of the action.

The Plaintiff-Respondent claimed Rs. 10,000,000 as damages, together with legal interest.

1.2. Defendant’s Position

The 1st Defendant–Appellant by Answer dated 18/09/2007, admitted and acknowledged that the Plaintiff–Respondent produced the film. However, it was his position that he was entitled to exploit the broadcast/public exhibition rights on the basis that such rights had been acquired from a third party, Warnakulasuriya Walter Fernando, who was said to have obtained rights from the Plaintiff–Respondent and thereafter sold the relevant television/broadcast rights to the Defendant.

In the Answer, the Defendant averred, inter alia, that, at the time of instituting the action, the Plaintiff had assigned the relevant intellectual property rights to Walter Fernando and therefore did not possess such rights. Accordingly, no cause of action had arisen against the Defendant. The Defendant further pleaded that the Plaintiff–Respondent was estopped by acquiescence and, in any event, that the cause of action was prescribed.

The Defendant stated that the applicable law was the Intellectual Property Code of 1979 and that, as the film was produced prior to the enactment of the Intellectual Property Act No. 36 of 2003, the Plaintiff–Respondent had no legal basis to claim relief under the said Act. The Appellant further stated that any use of the work by him was in good faith and prayed that the action be dismissed with costs.

1.3. The trial.

On 19/11/2007, the Defendant made an application by way of Petition and Affidavit to add the said Warnakulasuriya Walter Fernando as an added defendant. The Plaintiff–Respondent filed his Statement of Objections dated 29/02/2008. Thereupon, the Court allowed the addition of the said Warnakulasuriya Walter Fernando as an added defendant by order dated 05/09/2008.

However, the said Warnakulasuriya Walter Fernando passed away before filing Answer. The Plaintiff thereafter filed a Petition and Affidavit under Section 393 of the Civil Procedure Code dated 11/05/2011, stating inter alia, that since no cause of action had been pleaded against the said Warnakulasuriya Walter Fernando, the Plaintiff moved that the case proceed only against the 1st Defendant. By order dated 06/07/2012, the Court permitted the action to proceed against the 1st. Defendant–Appellant without substitution.

The Plaintiff–Respondent also instituted a separate action against MTV Channel (Private) Limited pertaining to the same subject matter, bearing Case No. HC (Civil) 62/2006/03, in which the Appellant and the said Walter Fernando were added as defendants. The Plaintiff–Respondent and MTV Channel (Private) Limited settled that action on 15/12/2014. However, as the Defendant had made a claim in reconvention therein, both matters, Case Nos. HC (Civil) 53/2006/03 and HC (Civil) 62/2006/03, were heard simultaneously.

At the conclusion of the trial, the learned Commercial High Court Judge delivered Judgment dated 05/05/2017, in favor of the Plaintiff–Respondent in Case No. HC (Civil) 53/2006/03. The Defendant’s claim in reconvention in Case No. HC (Civil) 62/2006/03 was dismissed subject to costs. Being aggrieved by the Judgment in Case No. HC (Civil) 53/2006/03, the Defendant-Appellant has preferred the present appeal.

1.4. Appeal to the Supreme Court.

In the Petition of Appeal, the Appellant, amongst other grounds, pleaded that the;

- Judgment is contrary to law,
- learned trial Judge erred in analyzing the facts,
- learned trial Judge failed to analyze documents 2V2, 2V3, 2V4, 2V6, 2V7 and 2V7(a), which the Appellant relied upon.
- award of damages was excessive.
- learned trial Judge erred in applying the provisions of the Intellectual Property Act No. 36 of 2003.

At the outset, I wish to state that the Plaintiff’s evidence-in-chief, which was tendered by an affidavit marked “X” at the trial on 10/03/2014, together with documents marked therewith, is not part of the record before this Court.

When the matter was listed before Court for argument on 18/10/2024, the Appellant, by motion dated 14/10/2024, brought to the notice of Court that the affidavit which contained the Plaintiff's evidence-in-chief (marked "X") together with the documents marked, was not filed of record, whereupon the Court made order that the said documents be filed together with the written submissions.

Despite such order, the said affidavit marked "X" was not filed before this Court.

Notwithstanding the aforesaid, learned counsel for both parties agreed, as recorded in the journal entry dated 30/01/2025, that the matter be heard and determined on the documents available before Court. Accordingly, I proceed based on the evidence available on record.

1.5. Economic Rights

It is the position of the Plaintiff-Respondent that he is the producer of the film *Parasathumal* and, as such, the original owner of economic rights.

He denies that he ever assigned or otherwise divested himself of those rights in favor of Warnakulasooriya Walter Fernando or any other person. He has consistently maintained that any permission granted by him from time to time was, at most, limited to licenses for specified screenings or exhibitions and not a transfer of ownership.

On that basis, the Plaintiff-Respondent states that the Defendant-Appellants position on Walter Fernando being a holder of economic rights is misconceived.

The Defendant-Appellant, on the other hand, relies on an entitlement through Walter Fernando. It is his position that the Plaintiff had, by agreement/assignment, transferred to Walter Fernando the intellectual property rights in the film, and that

Walter Fernando thereafter sold and transferred the relevant television/broadcasting rights to the Defendant.

The chain of entitlement pleaded by the Defendant is as follows,

- The document marked 2V1 agreement 23/01/1984, signed between Walter Fernando as the owner of the movie and the National Film Corporation.
- Agreement marked 2V7 dated 19/07/1997 signed by Walter Fernando and the Defendant, where Walter Fernando transfers the ‘TELEVISION TELECASTING RIGHTS, (BROADCASTING T.V.) VIDEO, EXHIBITION RIGHTS of the said film called “PARASATHU MAL...” to the Defendant.

It is noted that the principal document relied upon by the Defendant to justify the contention that Walter Fernando was the owner of the film is marked 2V1.

At face value 2V1 is an agreement between Walter Fernando / Nawa Cinema Films and the National Film Corporation, under which the National Film Corporation agrees to provide film distribution services (including storage and custody of prints/negatives, scheduling and dispatching to theatres, inspection, repair/maintenance, and accounting), in relation to the film listed in the schedule as “Parasathu Mal / Parasathumal.” Document 2V1 states that “the SUPPLIER is the owner of 35mm Cinematograph Sound FILM/S” described in the schedule.

The Plaintiff has never contested the contents of 2V1 and, in fact, admitted the same. However, the Plaintiff’s evidence was that the circumstances surrounding the signing of 2V1 were different and that the document was intended to have only a limited effect. He stated that, prior to the execution of 2V1, he had personally informed the National Film Corporation that he was granting Walter Fernando, whom he described as a close friend, permission to sign the document marked 2V1. The Plaintiff’s position was that he conferred upon Walter Fernando only limited rights to broadcast or exhibit the film

in the theatres of the National Film Corporation. This, according to the Plaintiff, was necessitated by the fact that the copies of the film had been destroyed in a fire at the Hendala Studio. Thereafter, Walter Fernando is said to have incurred expenses in bringing down copies of the film from London, copying the negatives, and making fresh prints. On that limited basis, Walter Fernando was authorized to exploit and/or broadcast the work only to the extent necessary to recover such expenses, and not by way of an absolute transfer of the Plaintiff's economic rights.

As stated in page 195 of the appeal brief:

උ: ස්වාමීනී හැඳල වික්‍රාගාරය සම්පූර්ණයෙන්ම ගිනි ගත්තා. පරසතු මල් වික්‍රපටයත් ඒ ගින්නට අසු වුනා. වෝල්ටර් ප්‍රනාන්දු කියන කෙනා මගේ මිත්‍රයෙක් ඔහු ඉතා ලහින්ම ආශ්‍රය කළ කෙනෙක්. මම එකේ පිටපතක් ආධාර දර්ශනයට දීලා තිබුනා ලන්ඩන් බෞද්ධ විහාරයේ. ඒ වික්‍රපටියේ පිටපත ගෙනාවෙ වෝල්ටර් ප්‍රනාන්දු මහත්මයා. ගෙනල්ල එය නැවත ඒ සඳහා පිටපත් කරලා මූලික නෙගෙටිව් පත් හදලා ඒ සියලු දේවල් වලට ඔහු අතින් යම්කිසි වැය ශීර්ෂයක් වුනා. එය පියවා ගැනීමට ජීවිත කාලයකට ජාතික වික්‍රපට සංචාවට ඔහුත් මාත් එකට ගොස් ඒ සඳහා මා කටයුතු කළා. ඒ ඔහු වික්‍රපටය නැවත සකස් කිරීමට කළ වියදම් පියවා ගැනීම සඳහා මා දුන් අනුමැතියක් නිසා. ඉන් පසුව ගාමිණී ෆොන්සේකා මහතා මියගියාට පසුව නැවත වික්‍රපට පිටපත් 6 ක් මුද්‍රනය කරල ඔහු වෙනුවෙන් අනුස්මරණ දැක්මක් හැටියට සී.ඒ.එල්. සමාගම මගින් පරසතු මල් වික්‍රපටය නැවත ප්‍රදර්ශනයට ලැබුනා.

The next question that arises is whether document 2V1 constitutes sufficient proof for the transfer of rights by the Plaintiff to Walter Fernando.

The document marked 2V1 was executed on 23/01/1984. The law governing the transfer of economic rights at the material time is contained in section 10, read with section 18, of the Code of Intellectual Property Act, No. 52 of 1979.

Section 10.

“Subject to the provisions of sections 12 to 16 the author of a protected work shall have the exclusive right to do or authorize any other person to do the following acts in relation to the whole work or a part thereof-

(a) reproduce the work;

(b) make a translation, adaptation, arrangement, or other transformation of the work;

(c) communicate the work to the public by performance, broadcasting, television or any other means.”

Section 18.

“(1) The rights referred to in section 10 shall be transferable in whole or in part.

(2) Any transfer, other than by operation of law, of a right referred to in section 10 shall be in writing signed by the transferor.

(3) A transfer, in whole or in part of any right referred to in section 10, shall not include or be deemed to include the transfer of any other rights referred to therein.

(4) When a contract provides for the total transfer of one of the rights referred to in section 10, the scope of such contract shall be limited to the exercise of such rights as are provided for in the contract.

(5) The transfer of ownership of the only copy or of one or several copies of a work shall not imply or be deemed to imply the transfer of the copyright in the work.”
(emphasis is mine)

A similar provision is reflected in **section 16(2) and (3)** of the Intellectual Property Act No.36 of 2003 as follows:

*“(2) Any assignment or transfer of an economic right, and any licence to do such an act subject to authorization by the owner of the copyright, **shall be in writing signed by the assignor and the assignee, transferor and the transferee or by the licensor and the licensee, as the case may be.***

(3) An assignment or transfer in whole or in part of any economic right, or a licence to do an act subject to authorization by the owner of copyright, shall not include or be deemed to include the assignment or transfer or licence in respect of any other rights not expressly referred to therein.” (emphasis is mine)

Pursuant to the foregoing section, the Act permits the assignment or transfer of economic rights only by a written instrument signed by the owner and the transferee and expressly provides that ‘no assignment or licence shall include any rights not specifically referred to therein’.

In ***Printcare Group and others v Mudali Peruge Manel Rupa Ranjani Kulatunga and another*** [SC (CHC) Appeal No. 05/2013, decided on 17.07.2024], the Plaintiff-Respondents were the joint authors and original owners of the economic rights in the Grade 6 Health and Physical Science textbook. They entered into a written agreement marked ‘Pe1’ with the Defendant-Appellants regarding the printing and supply of the textbook. Under that agreement, the Plaintiffs agreed to convey the economic rights to the Defendants, subject to payment of royalties. The Plaintiffs also consented to those rights being transferred to the Government for publication purposes. The Defendants were thereafter selected through a tender process to print and supply the textbook for 2007 and paid the Plaintiffs royalties for that year. However, when the textbook was reprinted in 2008, the Defendants failed to pay the

agreed royalties. In answer to the Plaintiffs' claim, they contended that the Plaintiffs had no subsisting entitlement because the economic rights had been assigned to the State via the Defendants.

The Supreme Court rejected this argument and held as follows;

“This ‘Pe1’ is not an agreement between the Government and the Plaintiffs but an agreement between the Defendants and the Plaintiffs. In terms of the Intellectual Property Act, any transfer, any assignment or licence relating to economic rights has to be in writing, signed by the transferor and the transferee, assignor and the assignee or licensor and the licensee as the case may be- vide section 16(2) of the Act. Even though there is a clear transfer of rights to the Defendants subject to certain conditions according to the above quoted paragraph, no document made after entering into ‘Pe1’ that confers such rights to the Government directly by the Plaintiffs or by the Defendants as per the consent for such purpose included in the above quoted paragraph has been marked in evidence. It must be noted no one has placed his signature on ‘Pe1’ on behalf of the Government. Thus, there is no acceptable proof of transfer of rights to the Government as per the consent expressed in the quoted paragraph above.”

Turning to document 2V1, as explained before, is an agreement between Walter Fernando / Nawa Cinema Films and the National Film Corporation for the provision of film distribution services. It does not constitute a written instrument of transfer executed by the Plaintiff in favor of Walter Fernando, nor does it expressly convey any specific economic right, such as television broadcast or communication to the public as required by section 16(3).

Even if the court is to accept the Plaintiff's evidence that he personally informed the National Film Corporation that Walter Fernando had his permission to sign 2V1, such

permission does not amount to a statutory assignment or transfer of economic rights within the meaning of the previous or the current statute. The IP Act of 1979 is explicit in requiring that the assignment or transfer of an economic right be carried out by a written instrument signed by the transferor at a minimum. There is no evidence before this court that satisfies this requirement.

The question is therefore not whether the Plaintiff consented to Walter Fernando entering into a distribution arrangement with the National Film Corporation, nor whether there exist other statements, correspondence or surrounding documents from which it may be inferred that Walter Fernando was treated as the holder of the economic rights, but whether there is sufficient proof of a lawful transfer of the Plaintiff's economic rights to Walter Fernando in the manner mandated by the Act.

That statutory requirement cannot be fulfilled by implication or by relying on surrounding conduct. Accordingly, in the present case, the Plaintiff's consent to Walter Fernando signing 2V1 cannot, by itself, cure the absence of a written agreement for the relevant economic rights from the Plaintiff to Walter Fernando, and 2V1 cannot be treated as sufficient proof of such transfer.

Even apart from the statutory requirements governing the transfer of economic rights under intellectual property law, such transfer is also subject to the general principles of contract law, which apply equally to agreements purporting to assign proprietary interests. A party seeking to rely on a contractual transfer of rights must establish not only the existence of an agreement, but also that the transferor possessed a valid title capable of being conveyed. It is a settled principle of law, encapsulated in the maxim *nemo dat quod non habet*, that no person can convey a better title than that which he himself possesses. Accordingly, where the alleged transferor has not lawfully acquired the relevant rights, any subsequent purported transfer is necessarily ineffective to the extent of that deficiency.

In the present case, even assuming that Walter Fernando entered into document 2V1 with the National Film Corporation in his own name, the effectiveness of that agreement depends entirely on whether he had previously acquired a valid title to the Plaintiff's economic rights. As already noted, there is no sufficient proof of a lawful transfer of such rights from the Plaintiff to Walter Fernando in the manner mandated by statute. In the absence of such a transfer, Walter Fernando could not, in law, convey ownership of economic rights which he himself did not possess. Therefore, the Defendant, who claims through or under Walter Fernando, cannot be placed in a better position than Walter Fernando himself.

1.6. Entitlement to Damages.

Having determined that the Plaintiff–Respondent is the original owner of the economic rights in the audiovisual work "Parasathumal" and that the Defendant–Appellant had no lawful authority to exploit those rights, I now turn to the question of damages, as the Plaintiff–Respondent has argued that the sum awarded by the learned Commercial High Court Judge is excessive.

The learned High Court Judge awarded damages in the sum of Rs. 1,500,000/- against the Appellant. The Appellant contends that this award is excessive and disproportionate to the actual loss suffered by the Plaintiff–Respondent. It is therefore necessary to examine the principles governing the assessment of damages in intellectual property infringement cases and to evaluate whether the quantum awarded can be justified.

Section 170 of the Intellectual Property Act No. 36 of 2003 sets out the remedies available for infringement of intellectual property rights. The relevant provisions state:

(1) Where a person to whom any recognized rights granted under this Act, proves to the satisfaction of the Court that any person is threatening to infringe or has infringed his rights or is performing acts which makes it likely to infringe a right under this Act, will occur, the Court may grant an injunction restraining any such person from commencing or continuing such infringement or performing such acts and **may order damages and such other relief as the Court may deem just and equitable**. The injunction may be granted along with an award of damages and shall not be denied only for the reason that the applicant is entitled to damages.

(2) --

(3)(a) The court shall have the power to order—

(i) the infringer to pay the right holder such damages as are **adequate to compensate him for the loss suffered by him**, by reason of such infringement, **in addition to the recovery of any profits**;

(ii)---

(iii)---

(b)---

(4) In making such orders the **need for maintaining a balance between the seriousness of the infringement and the remedies ordered**, as well as the interests of third parties shall be taken into consideration... (emphasis added)

Therefore, the Court is empowered to award "such other relief as the Court may deem just and equitable." This confers upon the Court a broad discretion that is not strictly confined to mathematical calculations of provable loss.

In *Sheela Wijewardene v. Sarath Kothalawala and Another* [SC CHC Appeal No. 04/13, decided on 23/05/2025], this Court had to consider the principles governing the award of damages in intellectual property infringement cases. In that case, Amarasekara J., citing Lionel Bently and Brad Sherman's text 'Intellectual Property Law, observed:

*"The most common remedy for infringement of intellectual property rights is an award of damages. The damages recoverable are the same as with other torts: **the aim is to restore the victim to the position he or she would have been in if no wrong had been committed**: it does not aim to punish the defendant."* (emphasis added)

I also wish to reiterate the role of an appellate court in relation to the assessment of damages. In *SC Appeal 68/21 with 69/21 (decided on 05/02/2026)*, it was observed that:

"The assessment of such damages is essentially compensatory and lies within the discretion of the trial judge. An appellate court will interfere with that assessment only where the trial judge has acted upon a wrong principle, misapprehended material evidence, or made an award so inordinately high or low as to constitute an erroneous estimate of the dependants' loss. In the absence of such error, the appellate court will not interfere to substitute its own assessment merely because it might have arrived at a different figure."

With that in mind, I make the following observations:

The Plaintiff–Respondent has claimed damages in a sum of Rs. 10 million. The learned Commercial High Court Judge, however, awarded Rs. 1.5 million, on the reasoning that during the pendency of the action, the Plaintiff–Respondent had received Rs. 100,000 and Rs. 150,000 from telecasting the film on television channels.

The learned Judge noted that the commercial value of the work during the pendency of litigation may diminish, as demand may reduce in circumstances where broadcasting entities are apprehensive of potential legal consequences.

The learned Judge further took the view that, since the Defendant–Appellant had telecast the film on television, the Plaintiff–Respondent might be unable to profit to the same extent from exhibiting the work in theatres. As a result, the Plaintiff–Respondent would be deprived of the full economic benefit of his rights in the work.

Additionally, it was considered that in 2004 the Plaintiff–Respondent had incurred a cost of Rs. 2 million to remaster the film in Kodak reels, and that the Defendant–Appellant’s actions had adversely affected the Plaintiff–Respondent’s ability to obtain a return on that investment.

Before assessing the quantum of damages, it is necessary to address the scope of the infringement for which damages may be awarded. The Appellant raised the defence of prescription, contending that any cause of action arising prior to 23/10/2004 (being two years before the institution of the action on 23/10/2006) is prescribed under Section 9 of the Prescription Ordinance No. 22 of 1871, which provides:

"No action shall be maintainable for any loss, injury, or damage, unless the same shall be commenced within two years from the time when the cause of action shall have arisen."

The learned High Court Judge held that each act of infringement gives rise to a fresh cause of action. Accordingly, whilst any claim for damages arising from alleged infringements prior to 23/10/2004 would be prescribed, the telecasts that occurred in 2006 gave rise to fresh causes of action that are not barred by prescription. I do not wish to depart from that determination of the learned High Court Judge.

The evidence establishes that two specific telecasts are the subject of the Plaintiff's complaint:

- a) the telecast on "Derana" television channel on or about 08/03/2006; and
- b) the telecast on "Sirasa" television channel on or about 30/09/2006.

Only these two infringements are subject to damages. Any loss allegedly suffered due to earlier telecasts or exploitation by the Appellant falls outside the scope of this action by operation of the law of prescription.

The Appellant has maintained that the film had been exploited by broadcasting it on television for a considerable period before 2006. He claims that even though the Plaintiff-Respondent is denying the knowledge of such telecasting, he should have been aware of such exploitation and did not object for years. On that ground, the Defendant argues that there had been acquiescence through delay. The Plaintiff-Respondent denied such knowledge when cross-examined, and the matter remains contested.

In any event, the documents filed of record by the Appellant, namely the agreement with MTV marked 2V8 dated 01/09/1998 authorizing the telecast of songs from the film, and the Invoice marked 2V9 dated 18/08/2004 relating to the cost of the telecast of the film, clearly demonstrate that arrangements for television exploitation were in existence well prior to the two telecasts in 2006 which alone are actionable in this case. In those circumstances, it would not be correct to attribute a broad and continuing diminution of the commercial value of the work solely to those two telecasts. As damages are confined to the infringements alleged in 2006, any substantial award predicated upon a long-term erosion of commercial value would, in substance, amount to compensation for loss said to have arisen from earlier exploitation in respect of which no damages can lawfully be awarded.

The Defendant has further contended that the Plaintiff's belated reaction gives rise to a plea of acquiescence and/or estoppel. Even if the Plaintiff disputes having known earlier telecasts, the record nevertheless discloses material indicating that, by at least late 2004, the Plaintiff–Respondent was corresponding regarding telecasts and permissions, and that such telecasts were broadcast on television networks available to the public at large.

This consideration is relevant, not for the purpose of extinguishing the cause of action in respect of the infringements alleged in 2006, which I have already held to constitute fresh and actionable causes of action, but in determining the proportionality of the compensation to be awarded. Where it alleges a substantial impairment of commercial value over time, yet the record discloses either a delayed objection or limited evidentiary material directed to the quantification of such loss (as discussed in the succeeding paragraphs), it becomes difficult to justify a substantial award founded upon assumed or speculative future diminution.

One of the most significant difficulties in determining the quantum of compensation arises from the absence of cogent evidence as to the magnitude of the damages claimed. In cross-examination, the Plaintiff–Respondent admitted that he was unable to explain how the figures of Rs. 10 million and Rs. 5 million pleaded as damages had been arrived at.

As stated in page 191 of the appeal brief

ප්‍ර: තමන්ට මේ ගරු අධිකරණයට කියන්න හැකියාවක් තියෙනවද තමන් මේ දැන් කිව්ව ආකාරයේ මිලියන දහයයි මිලියන 5යි මුදල තීරණය කරපු ආකාරය තමන්ට කියන්න පුළුවන්ද ඒ කියන්නේ ඒක හැදිව්ව හැටි කියන්න පුළුවන්ද මුදල?

උ: ස්වාමීනී මා විසින් තීරණය කළ දෙයක් නොවෙයි මගේ නීතිඥ මහත්වරුන් විසින් ඉදිරිපත් කළ යෝජනාවන් වලට මගේ නීතිඥ මහතුන් කළ තීරණයන් වලට සවන් දීමෙන් පමණයි

ප්‍ර ඒක තමන්ගේ තීරණයක් නොවේ?

උ: මගේම තීරණයක් නොවේ.

ප්‍ර: තමන් සහ නීතිඥ මහත්වරුන් දුන් උපදෙස් අනුව තමයි තමන් කියන්නේ ඒ මුදලට තමන් අධිකරණයට පැමිණිල්ලක් ඉදිරිපත් කළේ

උ: එහෙමයි

ප්‍ර: දැන් එතකොට තමන් දිවුරලා මේ අධිකරණයට කියන්න හැකියාවක් නැහැ මේ රුපියල් මිලියන පහයි මිලියන දහයයි හැදුනේ කොහොමද කියලා. එහි ගණිතමයි ආකාරය පැහැදිලි කරන්න හැකියාවක් නැහැ?

උ: නැහැ

ප්‍ර: එහෙම හැකියාවක් නැත්ත ගණිතමය ආකාරයෙන් ගණන් හදල නොවේ මේ වන්දි මුදල පැමිණිල්ල සඳහන් කරේ?

උ: මා නොවේ.

ප්‍ර: ගණන් හදල ආවා ගනනකට අනුකූලව නොවේ මේ පැමිණිල්ලේ සඳහන් වන්දි මුදල සඳහන් කරලා තියෙන්නේ?

උ: වන්දි මුදල පිළිබඳව තීරණය කළේ නීතිඥ මහත්වරුන්.

ප්‍ර: තමන් නොවේ?

උ: නැහැ

ප්‍ර: ඒ අවස්ථාවේදී නීතිඥ මහත්වරුන් ගණන් හැදීමක් කරලා ඒ අදාළ මුදල තීරණය කළාද?

උ: දන්නේ නැහැ

Damages under section 170 must be “**adequate to compensate ... for the loss suffered**” and must maintain a balance between the seriousness of the infringement and the remedy ordered. Accordingly, the Court must be cautious to confine any award to loss that is proved, or can be inferred on sound evidence, as having resulted from the two actionable telecasts in 2006.

In the specific context of copyright, the Act further directs that the quantum of damages is to be fixed by taking into account, inter alia, “the importance of the material and moral prejudice suffered by the owner of the right,” and “the importance of the infringer’s profits attributable to the infringement.”

The Plaintiff–Respondent has pleaded that the film was remastered in 2004, at a cost of Rs. 2,000,000/= and subsequent to that, he entered into a contract with Ceylon Theatres for exhibition in theatres. The quantum of damages requested by the Plaintiff appears to be based, at least in part, on the proposition that the Plaintiff–Respondent’s commercial prospects in earning from theater exhibitions were diminished due to the telecasting on TV. However, the Plaintiff has not, given any material, either by reference to licence fees which prevailed in the market, lost exhibition opportunities, audience figures, or other objective criteria to arrive at a conclusion.

As held earlier, damages must be confined to the two infringements in 2006, namely the “Derana” telecast on or about 08/03/2006 and the “Sirasa” telecast on or about 30/09/2006.

On the material before Court, the most reliable benchmark for assessing any “material” loss is the prevailing market value of a telecast licence at the relevant time. The Plaintiff–Respondent’s own evidence places the estimated earnings per telecast in the range of Rs. 100,000/- to Rs. 150,000/-.

Proceeding on the upper figure of Rs. 150,000/—being the assumption most favourable to the Plaintiff–Respondent—the aggregate licence-equivalent value attributable to two telecasts would be Rs. 300,000/-.

There is also evidence that the connected Action against the MTV Channel was also settled on 15/12/2014 for Rs. 300,000/-.

Taking all matters into account that,

- i. damages must be confined to the two actionable infringements in 2006,
- ii. the Plaintiff's own evidence places the telecast value in the range of Rs. 100,000/- to Rs. 150,000/- per telecast,
- iii. the claim for future or consequential loss is not demonstrated by coherent evidence or computational basis,
- iv. compensation had been already received in relation to the “Sirasa” telecast,
- v. proportionality is mandated through statute, and the Court must balance the seriousness of the infringement against the remedy, and
- vi. the recognition by statute, which is “material and moral prejudice” and the infringer's profits as relevant considerations.

In the circumstances, I am of the view that an award of Rs. 1,500,000/- is excessive and disproportionate. At the same time, it must be recognised that an infringement of protected rights did occur, and that the remedy awarded must reflect the seriousness of an unauthorized public exhibition.

On the material before Court, and bearing in mind that the judicial task is to award a sum that is “appropriate and just” within a compensatory framework, I would accordingly set aside the award of Rs. 1,500,000/- and substitute therefor a sum of Rs. 750,000/- as damages payable by the Defendant–Appellant to the Plaintiff–

Respondent, together with legal interest from the date of the Judgment of the Commercial High Court.

Appeal partly allowed.

Judge of the Supreme Court

Dr. Sobhitha Rajakaruna, J.

I agree

Judge of the Supreme Court

Sampath B. Abayakoon, J.

I agree

Judge of the Supreme Court